

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEON JAMES	:	CIVIL ACTION
	:	
v.	:	
	:	
SUPERINTENDENT, OF SCI HUNTINGTON,	:	
etc., et al.	:	No. 97-2864

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

January 3, 2000

Petitioner Leon James ("James") has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. By order of August 18, 1998, the court referred his petition to the United States Magistrate Judge Diane M. Welsh ("Judge Welsh") for a Report and Recommendation. Judge Welsh recommended denial of the petition; James filed objections to that recommendation. After de novo consideration of petitioner's objections, the Report and Recommendation will be approved and the petition will be denied.

PROCEDURAL HISTORY

On June 12, 1975, petitioner was convicted in the Court of Common Pleas of Philadelphia County of first degree murder, aggravated robbery, burglary, and assault and battery with intent to commit murder.¹ The petitioner was subsequently sentenced to a life term of imprisonment for

¹ This was his second trial; the petitioner's first trial had resulted in his conviction on the same charges. Commonwealth v. James, 393 A.2d 1199, 12000 (Pa. 1978). On direct appeal, the Supreme Court of Pennsylvania granted a joint request for remand. Id. On March 5, 1975, the remand court granted the petitioner's motion for a new trial. Id.

murder and concurrent terms of ten to twenty years for robbery and burglary and three and one-half to seven years for assault. The petitioner is currently serving those sentences at the State Correctional Institution-Huntington.²

Petitioner's habeas petition presents seven claims:

- 1) Petitioner's conviction was based on his involuntary confession.³
- 2) Both trial and appellate counsel rendered ineffective assistance for not preserving an objection to the involuntary confession on direct appeal.
- 3) Trial counsel rendered ineffective assistance when he elicited testimony referring to petitioner's first trial at petitioner's second trial.
- 4) Appellate counsel rendered ineffective assistance when he failed to raise the third claim on direct appeal.
- 5) Petitioner was denied due process by prosecutorial misconduct during his closing argument.
- 6) Both trial and appellate counsel rendered ineffective assistance by failing to raise the prosecutor's alleged misconduct at trial or on direct appeal.
- 7) Petitioner was denied due process during his state

² A more detailed account is found in the Magistrate Judge's Report and Recommendation.

³ The first and second claims both involve an alleged involuntary confession. The first claim asserts petitioner's conviction was obtained by the use of an involuntary confession. The second claim asserts both trial and appellate counsel rendered ineffective assistance for failing to preserve this claim on direct appeal.

collateral attack by the state court's misunderstanding of the basis of his claim; he should have been granted a new trial as a result of newly discovered evidence.

Claims one and two have been voluntarily withdrawn. The third, fourth and sixth claims have been exhausted in state court; the fifth and seventh claims have been procedurally defaulted.

FACTS

The victims, Henry and Louis Cooper, had operated the Cooper's Sporting Goods Store at 4655 N. Fifth Street. On the evening of May 5, 1971, at about 9:05 p.m., two men knocked on the door of the store. One of the two men knocking on the door was the petitioner. When the door opened, Henry Cooper was shot in the stomach three times; he called out for his brother. His brother approached the door and was fatally shot. Henry Cooper identified the petitioner, wearing a yellow jacket, as the person who shot his brother.

At trial, petitioner's statement, asserting that he went to the store that night after smoking some "grass" with a man named Flynnie and Danny Cronin, was read into the record. It was Danny Cronin's idea to rob the store; he provided a weapon and waited in the car. The petitioner claimed that, upon knocking at the door, he was hit with a bat and the gun "just kept firing."

There were also three separate eyewitness accounts of

the events prior to the shooting. Donna Vandever Cronin testified that she was in her house with her husband Danny, Flynnie, and James. She remembered the men were in the kitchen from 6:00 p.m. until 7:00 p.m. Donna Cronin had previously given the police a statement that petitioner left the house wearing a light color jacket. She testified that she could no longer remember the exact color of the jacket. Donna Cronin further testified that Flynnie and Danny, but not James, returned later that night.

Two women testified that they had been walking near the store on the night of May 5, 1971. They both heard a loud noise coming from the store and then saw a man, wearing a yellow jacket, run from the store. Both women rushed to the store and witnessed Henry Cooper bleeding on the ground.

DISCUSSION

Petitioner's claim that trial counsel rendered ineffective assistance, by eliciting testimony of petitioner's first trial at his second trial, has been procedurally exhausted.

The claim of ineffective assistance of counsel is evaluated in accordance with Strickland v. Washington, 466 U.S. 668 (1984). First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." Id. at 688. This determination must be "highly deferential." Id. at 689. A court must "eliminate the distorting effects of hindsight, to reconstruct the

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. There is a strong presumption that counsel's conduct falls within the wide range of reasonable assistance, and that, under the circumstances, the action might be considered sound strategy. See id.

Second, petitioner must show counsel's ineffectiveness was prejudicial, that is, "there is a reasonable probability that, absent errors, the fact finder would have had a reasonable doubt respecting guilt." Id. at 695.

The petitioner contends the trial transcript shows references to the petitioner's prior trial elicited by his own counsel.⁴ But there is no reference to the verdict and only vague references to the substance of the previous trial. It is possible these passing references were necessary to elicit the information from the witnesses; trial counsel was attempting to weaken the witnesses' testimony. Counsel's assistance falls within an objectionably reasonable standard even if his examination of witnesses was not as skilled as it could have been. See id. at 688.

Petitioner suffered no prejudice from the alleged ineffectiveness. He relies on United States v. Universal Rehabilitation Services, 167 F.3d 171 (3d Cir. 1999),

⁴ See Report and Recommendation at p. 8.

vacated & reh'g granted, 1999 WL 239513 (April 15, 1999)(en banc) (admitting guilty pleas of co-defendants prejudices defendant in the eyes of the jury), but there, guilty pleas were expressly admitted in evidence. Here, no guilty pleas were admitted in evidence; there are passing references to a previous trial, but not to any finding of guilt. The government relied not only on petitioner's confession but on four witnesses to establish guilt.

The totality of the evidence must be considered. See Buehl v. Vaughn, 1999 WL 20823 (3d Cir. 1999). The greater the evidentiary support for a conviction, the less likely any alleged error might have affected the verdict. In addition to evidence of petitioner's confession, four witnesses, including an eyewitness to the homicide, testified. The evidence against petitioner was strong. Petitioner cites several cases calling into question the value of eyewitness accounts,⁵ but evidence is not viewed in isolation. The eyewitness account, possibly enough to uphold a conviction, was supported by testimony of three witnesses who placed petitioner at the scene of the crime. The weight of the evidence clearly affords an adequate basis for finding lack of prejudice from counsel's arguably deficient performance. The third claim of ineffective assistance fails both parts of the Strickland test.

⁵ See petitioner's objections at p. 7.

The fourth claim (appellate counsel rendered ineffective assistance by not raising trial counsel's error on direct appeal) was objected to but not briefed by the petitioner. Since trial counsel was not ineffective under the Strickland test, appellate counsel was not ineffective for not asserting a meritless claim.

The fifth claim (prosecutor's remarks during closing argument deprived the petitioner of due process) has been procedurally defaulted. Because the claim has been procedurally defaulted, it cannot be reviewed unless petitioner can show cause for the default and actual prejudice or that failure to consider the claim will result in a miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722 (1991). The standard for cause includes, "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the state's procedural rule." Id. at 753. No cause for the procedural default has been asserted so it is unnecessary to consider whether petitioner was actually prejudiced.

The fundamental miscarriage of justice exception is limited to cases of "actual innocence." Schlup v. Delo, 115 S. Ct. 851, 864 (1995). Petitioner can only be considered "actually innocent" if he presents new evidence of his innocence. Id. at 861-62. The court considers the new evidence of "actual innocence" together with all evidence of record. Id. at 867.

No new evidence of actual innocence has been presented and the evidence of record, including the eyewitness identification, establishes guilt. There has been no fundamental miscarriage of justice.

The sixth claim is that both trial and appellate counsel rendered ineffective assistance when they failed to object to the prosecutor's alleged misconduct in his closing argument. Petitioner complains of two separate incidents of prosecutorial misconduct during closing argument: vouching⁶ and referring to another defendant's incarceration.⁷

Vouching has been held reversible error when it "is aimed at the witness's credibility and is based on extra-record evidence..." United States v. Dispoz-O-Plastics, 172 F.3d 275, 286 (3d Cir. 1999). "A prosecutor's expression of personal opinion about the credibility of witnesses or the guilt of a defendant creates a risk that the jury will trust the government's judgment rather than its own view of the evidence. However, the fact that a prosecutor made improper statements is insufficient, by itself, to require a new trial." Buehl v. Vaughn, 166 F.3d 163, 176 (3d Cir. 1999). Here, the prosecutor's remarks did not refer to evidence not of record, but to the prosecutor's reasons for offering evidence at trial. There was no prosecutorial endorsement

⁶See Report and Recommendation at p. 14 for the exact quotation.

⁷See Report and Recommendation at pp. 15 - 16 for the exact quotation of the alleged improper remarks.

of a witness's credibility nor any reference to evidence not admitted at trial. The comments complained of were improper because the prosecutor sought credit for trying the case fairly; i.e., for following the law.

Even if the comments were improper bragging about matters irrelevant to the jury's deliberations, trial and appellate counsel were not necessarily ineffective for failure to object at trial or raise the issue on appeal. Magistrate Welsh's report properly considered the prejudice prong first. See Strickland v. Washington, 466 U.S. 668, 697 (1984).

The trial evidence presented included a confession, an eyewitness identification, and circumstantial evidence of three witnesses placing petitioner at the store at the time of the incident. Petitioner must show that "there is a reasonable probability that, absent errors, the fact finder would have had a reasonable doubt respecting guilt." Id. at 695. This standard is not met. Considering the entire case presented by the prosecution, this complained of conduct, while inappropriate, had little or no effect on the outcome.

The second objection of the petitioner to the prosecutor's closing argument was an alleged improper reference to a co-conspirator's guilt. This reference was objected to by petitioner's trial counsel, so the objection is considered with regard to appellate counsel's representation.

Petitioner objects to testimony by the wife of a convicted co-defendant because he alluded to her husband's incarceration. Petitioner claims this would lead the jury to understand his co-defendant had either plead guilty or been convicted by another jury. Objection to her testimony was made at trial, and overruled; it was not unreasonable for appellate counsel not to pursue the objection further. The comments made by the prosecutor referred to testimony given at trial. The testimony referred to by the prosecutor in closing was elicited on direct examination to clarify the motivations of the witness. The prosecutor's statements were factually accurate.

Appellate counsel may choose to avoid weak arguments on appeal to avoid diluting the force of other arguments. There is no reason to believe appellate counsel was not exercising reasonable professional judgment.

The comments of the prosecutor to bolster the credibility of that one witness were not prejudicial. Those comments about her husband's being in jail would not necessarily lead jurors to conclude an alleged co-conspirator had plead guilty or been convicted. The jury considered a personal confession, an eyewitness account, and testimony of three other witnesses presenting circumstantial evidence. The other evidence was weighty and sufficient to convict beyond a reasonable doubt. Appellate counsel's decision not to raise the impropriety of prosecutor's

closing argument on appeal was not ineffective assistance of counsel.

The seventh claim (petitioner was deprived of due process because the state court judge in his collateral attack misunderstood the basis of his newly discovered evidence claim) was procedurally defaulted. In order for the procedural default to be excused, the court must determine whether there is "cause" and "actual prejudice" or a "fundamental miscarriage of justice." See Coleman v. Thompson, 501 U.S. 722 (1991).

Petitioner does not address whether there was "cause" and "prejudice" or assert any "fundamental miscarriage of justice." Petitioner continues to argue this seventh claim was not procedurally defaulted. Because petitioner has stated no reason for the procedural default, the claim cannot be examined on the merits.

CONCLUSION

Petitioner asserts seven objections to the Report and Recommendation. Each of the objections has been independently considered by the court. There is no adequate ground for granting the petition for a writ of habeas corpus; it will be denied. A certificate of appealability will not be granted.

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ORDER

AND NOW, this 3rd day of January, 2000, upon consideration of petitioner's objections to the Magistrate Judge's Report and Recommendation on a writ of habeas corpus, and respondent's response thereto, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**.
2. The petition for writ of habeas corpus is **DENIED**.
3. A certificate of appealability is not granted.

Norma L. Shapiro, S.J.